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No. 90-609

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

**REICHOLD CHEMICALS, INC., PETITIONER**

v.

**NATIONAL LABOR RELATIONS BOARD AND  
TEAMSTERS LOCAL UNION NO. 515**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the court of appeals erred in setting aside, as unsupported by substantial evidence, the National Labor Relations Board's determination that petitioner's unfair labor practice was not a cause of a strike by petitioner's employees.



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 906 F.2d 719. The supplemental decision and order of the National Labor Relations Board (Pet. App. A22-A44) are reported at 288 N.L.R.B. 69; the Board's original decision and order (Pet. App. A45-A103) are reported at 277 N.L.R.B. 639.

## **JURISDICTION**

The judgment of the court of appeals was entered on June 12, 1990. A petition for rehearing was denied on September 24, 1990. The petition for a writ of certiorari was filed on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In November 1982, Teamsters Local Union No. 515 (Union) was certified as the bargaining representative for petitioner's production and maintenance employees. In January 1983, petitioner and the Union began bargaining for an initial agreement. Over the next 13 months, the parties met in 29 separate bargaining sessions. The parties reached agreement on a broad range of subjects. Throughout the negotiations, however, the Union objected to petitioner's insistence on including in the no-strike clause a waiver of the employees' right to engage in unfair labor practice strikes. The Union also objected to a proposal to include in the no-strike clause a provision, known as the "no access" provision, that waived the employees' right to file charges with the Board if an unfair labor practice strike occurred and employees were replaced or disciplined. During bargaining, the Union president identified the no-strike clause and a management rights proposal as strike issues. Although petitioner made several concessions, it adhered to its demand for broad language in the management rights and no-strike clauses. Despite a narrowing of differences, the parties bargained to impasse without reaching an agreement. Pet. App. A3-A4, A10, A27-A28, A36, A58-A59, A73-A74, A76, A92.

In August 1983, several months into the negotiations, the Union conducted a strike vote; on April 1, 1984, after impasse had been reached, the Union did so again. At both strike-vote meetings, the employees, at the urging of the Union president, voted unanimously to authorize a strike. During both meetings, the Union president discussed a number of petitioner's proposals that he perceived as objectionable. He criticized petitioner's proposals as waiving the employees' right to challenge employer conduct during the term of the agreement, and specifically

objected to the proposed management rights and no-strike clauses as "unreasonable," "outrageous," and unlike any he had ever seen before. Pet. App. A3-A4, A10, A11-A12, A34-A36, A76-A79.

Immediately after the second strike-authorization vote, the employees began a strike. On April 6, 1984, the strike ended with the employees' unconditional offer to return to work. Petitioner refused to reinstate 27 strikers who had been permanently replaced. Pet. App. A4, A46, A77-A78, A98-A99.

2. The Union filed charges alleging, *inter alia*, that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by engaging in surface bargaining and by insisting to impasse on the waiver of employees' statutory rights. The charges also alleged that those violations of Section 8(a)(5) and (1) caused the strike, and thus rendered it an unfair labor practice strike, rather than an economic strike. Under *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956), unfair-labor-practice strikers are entitled to reinstatement with back pay, even if the employer has hired permanent replacements. Therefore, the charges alleged, petitioner's refusal to reinstate the 27 permanently replaced strikers violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). Pet. App. A56-A57.

The Board, in disagreement with the administrative law judge, found that the "totality of [petitioner's] conduct throughout the course of negotiations establishes that [it] engaged in hard bargaining, rather than surface bargaining." Pet. App. A47. The Board also disagreed with the judge's finding that the proposed waiver of rights contained in the no-strike clause was "an illegal bargaining subject." *Id.* at A49. Accordingly, the Board concluded that petitioner "did not violate Section 8(a)(5)" and "the strike was not an unfair labor practice strike." Pet. App. A50-A51.

In light of those findings, the Board also reversed the ALJ's finding that petitioner "violated Section 8(a)(3) by permanently replacing its striking employees." Pet. App. A51.

3. On the General Counsel's motion for reconsideration of the Board's Section 8(a)(5) findings, the Board issued a supplemental decision and order. The Board reaffirmed its ruling that petitioner had not engaged in surface bargaining, and that petitioner did not violate the Act by bargaining to impasse on a proposal to waive the employees' right to engage in unfair labor practice strikes. Pet. App. A22-A23, A31-A32.

On the issue whether it was lawful for petitioner to insist to impasse on a waiver of the employees' right of access to the Board, however, the Board reversed its earlier ruling. The Board concluded that the no-access provision concerned a non-mandatory subject of bargaining; therefore, petitioner's insistence to impasse on that proposal violated Section 8(a)(5) of the Act. Pet. App. A23, A32-A33. In classifying the no-access provision as non-mandatory, the Board noted that it is "contrary to a fundamental policy of the Act and is unrelated to terms and conditions of employment." *Id.* at A32.<sup>1</sup>

Although the Board found that petitioner had violated the Act, it reaffirmed its previous finding that the strike was an economic strike rather than an unfair labor practice strike. The Board explained that "the General Counsel ha[d] not established the requisite causal connection between [petitioner's] unlawful conduct and the employees' decision to strike." Pet. App. A36. The Board acknowledged that the no-access provision was incorporated in the

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<sup>1</sup> Because of this conclusion, the Board found "it unnecessary to decide whether [the no-access provision] was an illegal, as distinguished from merely permissive, subject of bargaining." Pet. App. A33 n.19.

proposed no-strike clause; that the employees struck in part in protest over petitioner's proposed no-strike clause; and that the employees voted to strike on the basis of the Union president's recommendation. *Id.* at A34-A36. Nevertheless, in light of its finding that the no-access provision itself "was never discussed with employees at either of the strike-vote meetings," the Board "decline[d] to find that this proposal played any part in the employees' decision to strike." *Id.* at A36.

4. The court of appeals affirmed the Board's decision except as to the finding of strike causation. On that issue, the court concluded that the decision was not supported by substantial evidence because the Board had improperly focused on whether the employees voting to strike had first-hand knowledge of the no-access provision and had "ignore[d]" other evidence that "proves the point on causation." Pet. App. A11. Pointing out that "the union representative's reasons for calling or recommending a strike may provide the basis for determining causation," *id.* at A14, the court found that the employees had "voted to strike solely pursuant to the Union President's recommendations" and that one of the president's reasons for recommending a strike was petitioner's insistence to impasse on the no-access provision. *Id.* at A11-A12.

The court rejected the Board's view that, "because the employees voted directly on the strike issue, their presumed lack of knowledge of the no-access provision is fatal to their causation claim." As an initial matter, the court noted that at least five employees who participated in the strike vote "presumably knew" of the proposal because of their participation in bargaining sessions in which the no-access issue was discussed. The court also noted that the record was silent as to the knowledge of the remaining employees because the administrative law judge

had prevented them from testifying about their reasons for striking. Pet. App. A12-A13.

Furthermore, the court stated, the Board's position overlooked that employees not only can "formally cede authority to a union agent to call a strike," but "can also achieve the same result" by ratifying the union agent's recommendation. Pet. App. A13-A14. "In either case, the union representative's reasons for calling or recommending a strike may provide the basis for determining causation." *Id.* at A14. Having found that "the employees voted to strike solely pursuant to the Union President's recommendation," *id.* at A11, and that his recommendation was based in part on "his view that the provisions of the no-strike clause were outrageous," the court concluded that the employees adopted "the Union leader's judgment that they should strike because of [petitioner's] demand for a no-access provision." *Id.* at A14.

Accordingly, the court set aside the Board's determination on causation, and remanded the case to the Board for modification of its order. Pet. App. A15, A20-A21.<sup>2</sup>

#### ARGUMENT

The court's disagreement with the Board concerning the cause of the strike turns on differing assessments of the particular facts of this case. Because the opinion neither establishes novel principles of law nor conflicts with any decision of this Court or of any other court of appeals, this Court's review is not warranted.

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<sup>2</sup> Judge Silberman concurred, noting that the court was "looking at the issue on review as solely a sufficiency of the evidence question" and that the Board's decision did not appear to articulate any policy-based reasons for the Board's drawing the particular factual inferences it did. Pet. App. A21.

1. a. It is settled that a strike is an unfair labor practice strike "if an unfair labor practice had anything to do with causing" it. *General Drivers and Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir.), cert. denied, 371 U.S. 827 (1962). Accord *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir.), cert. denied, 409 U.S. 850 (1972); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981). The Board, with court approval, has held that there must be a demonstrable "causal connection" between the unfair labor practice and the strike. *Typoservice Corp.*, 203 N.L.R.B. 1180, 1180 (1973); *Road Sprinkler Fitters Local No. 669 v. NLRB*, 681 F.2d 11, 20 (D.C. Cir. 1982), cert. denied, 459 U.S. 1178 (1983); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 906 (5th Cir. 1978). Accordingly, the Board has held that it must engage in a case-by-case "search" for the actual causes of a strike. *Brooks, Inc.*, 228 N.L.R.B. 1365, 1367 n.12 (1977), enforced in relevant part, 593 F.2d 936 (10th Cir. 1979).

When the employees themselves make the decision to strike, "the employees' reasons for striking" are considered "good evidence" of the strike's cause. *Brooks, Inc.*, 228 N.L.R.B. at 1367 n.12. But, when employees have ceded decisionmaking authority to their union representatives, the focal point of the Board's inquiry is not "the employees' reasons for striking but rather \* \* \* the 'impetus for the Union's decision to strike.'" *Ibid.*, quoting *Typoservice Corp.*, 203 N.L.R.B. 1180, 1180 (1973). The Board applied that principle in *Brooks, Inc.*, stating that "it was the Union that called the strike and it, indeed, did so in response to Respondent's unfair labor practices"; in that situation the "employees' motivation" was not "the decisive matter." 228 N.L.R.B. at 1367 n.12.

b. In this case, the Board found that, since the Union asked the employees to vote on the strike, the employees had retained decisionmaking authority with respect to the

strike. Accordingly, the Board gave controlling weight to testimony indicating that although a number of specific management proposals were mentioned at the strike meetings as reasons to strike, there was no explicit mention of the no-access provision. Pet. App. A36.

The court of appeals, on the other hand, found that the Board had overlooked the circumstance that the employees, in voting to strike, had relied "solely" on the Union President's recommendation. Pet. App. A11. In the court's view, the employees had effectively ceded authority to the Union to call a strike for the reasons it deemed appropriate. Because the Union president was motivated to recommend a strike at least in part by his belief that the no-access provision was "outrageous," the court concluded that the strike was caused by an unfair labor practice. *Id.* at A13-A14.<sup>3</sup>

Contrary to the contention of petitioner (Pet. 5-8) and amicus The Society of the Plastics Industry, Inc. (Br. 5), the court of appeals did not establish a new rule that either renders irrelevant the employees' motivation for striking or makes the subjective intention of union officials the determinative factor in ascertaining the cause of a strike. Rather, the court simply disagreed with the Board's assessment of the evidence, finding, contrary to the Board, that the employees relied on the Union's judgment in deciding whether to strike.<sup>4</sup> While we believe that the court should

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<sup>3</sup> To qualify as an unfair-labor-practice strike, the unfair labor practice need not be the sole impetus for the strike; it need only be a "contributing cause." See, e.g., *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d at 404; *Road Sprinkler Fitters Local No. 669 v. NLRB*, 681 F.2d at 20.

<sup>4</sup> The court of appeals underscored that it agreed with the Board that the issue on review was an "evidentiary" one because "neither the Board's decisions nor its brief suggests that the Board meant to endorse a *legal* principle that an employer's unlawful insistence on a

not have substituted its judgment for that of the Board, the disagreement between the Board and the court presents—as the court itself recognized (see note 4, *supra*)—only an evidentiary issue, which does not warrant review by this Court. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Nor is the court of appeals' holding in tension with the principle that "[m]ere awareness of unfair labor practices is insufficient to establish th[e] causal connection" between the practices and the decision to strike, *Road Sprinkler Fitters Local No. 669 v. NLRB*, 681 F.2d at 20, as petitioner (Pet. 9) and amicus Capital Associated Industries, Inc. (Br. 7) assert. Petitioner argues that if "mere awareness" is insufficient, "no awareness" on the employees' part must also be insufficient (Pet. 9), but that argument ignores that, as the court of appeals read the record, the causal inquiry in this case focuses on the factors prompting the Union's president to recommend a strike. It is uncontested that he was aware of and motivated by petitioner's unfair labor practice. In view of the court of appeals' determination that the employees had effectively ceded authority to the Union to decide whether to strike, the employees' asserted lack of awareness of the unfair labor practice is not germane.

2. Petitioner errs in asserting (Pet. 8-10) that the decision below conflicts with *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1320 (7th Cir. 1989); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614 (9th Cir. 1983); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 906 & n.21 (5th Cir. 1978); and *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820-821 (6th Cir. 1975). Although

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nonmandatory subject can never be a contributing cause of [a] strike absent clear evidence that the employees were fully aware of the nature of the offending contract demand." Pet. App. A6-A7 n.2.

the courts in those cases considered the employees' reasons for striking, none of those decisions establishes a general principle that the *union's* motivation in calling a strike can never be determinative of causation.<sup>5</sup> Those cases simply did not involve the causation analysis that is appropriate when the union is effectively entrusted with authority to call a strike.

Finally, petitioner's reliance (Pet. 10-11) on *Winter Garden Citrus Products Cooperative v. NLRB*, 238 F.2d 128 (5th Cir. 1956), and *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704-707 (7th Cir. 1976), is also misplaced. In *Winter Garden Citrus Products*, the court rejected the union representative's asserted reasons for the strike, finding that the actual course of bargaining revealed that the true issues motivating the strike were "at war" with the reasons asserted by the union representative in his written communications to the employer. 238 F.2d at 130.

Similarly, in *Colonial Haven Nursing Home*, the court found that, despite conclusory testimony by the union representative and the employees that the strike was in protest of employer unfair labor practices, the entirety of their testimony illustrated that the strike was precipitated by their desire that the employer recognize and bargain with the union. 542 F.2d at 705. The only unfair labor

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<sup>5</sup> Indeed, to the degree they address the issue at all, these cases seem to suggest that the union's reasons are, in fact, pertinent. In *Northern Wire*, for instance, the court, in finding the strike to be an unfair labor practice strike, relied in part, 887 F.2d at 1320, on the bargaining-table statements of a union representative about the possible causes of a strike—the very type of evidence relied upon by the court here. See Pet. App. A11, A13-A14. In *Airport Parking Management*, 720 F.2d at 614, the court cited *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 907 (9th Cir. 1953), for the proposition that a union business representative's testimony as to the reasons for a strike constitutes "substantial evidence" of the strike's causation.

practices that occurred before the strike were relatively minor and removed in time from the employees' decision to strike, while the strike meeting itself followed on the heels of the Board's dismissal of the union's representation petition. *Id.* at 694-695, 705. Here, by contrast, the court of appeals found it "undisputed" that the unfair labor practices played a role in the Union president's decision to recommend a strike, Pet. App. A12, and the record supports that analysis. Throughout the bargaining process, the president clearly informed petitioner that he viewed the no-access clause as both a genuine impediment to agreement and a strike-worthy issue.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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